for about 18 months.
THE COURT: It's been a long case.
MR. WELSH: He's engaged in six different proffer sessions, as pointed out in the 5(k) motion. I've spent a total of 12 hours with him and U.S. attorneys, customs agents,
DEA agents. There was an investigation down in Connecticut.
I was in touch with the Assistant U.S. Attorney down in Connecticut, and we had indicated a willingness to cooperate
with them on an investigation that was going on down there.
It never actually came about, because the individual apparently pleaded guilty before we got to that.
As recently as last week, Mr. Hernandez was before, was here in Boston, where we had a proffer with a customs agent relative to a homicide that supposedly had taken
place in Lawrence, and he indicated a willingness to give information on that matter. That is still under investigation, so that may result in a Rule 35 motion later on. You understand, I'm sure, for example, from the 5(k) motion the Government points out Isidro Hernandez was notified
that Pedro had indicated a willingness to testify against him,
so that increases his risk while he's in prison. He becomes known as a cooperator.
I'm also concerned about possible danger to Aura and her children once it becomes known that he is a cooperator. I would also point out to you that because he's

been cooperating, his sentence, we had all agreed his sentence might be delayed, and he was originally supposed to be sentenced back in February, and now here we are, six months down the road, by agreement, so he could continue his cooperation, but I know from my own experience that the situation in Plymouth, where he's been locked up, involves a lot of hardships.

There are no contact visits in Plymouth. They're restricted to one unit. They're not allowed to move throughout the system, and there are no programs similar to Federal programs. I would also like to argue to you, if you read through the offense conduct, it appears that Pedro Hernandez really played a relatively minor role in this conspiracy.

THE COURT: The problem in this case, as I see it, is not only the conduct in this case, but the prior convictions, which under the guidelines, as you know, classify him as a career offender.

MR. WELSH: I understand.

THE COURT: Without the motion to depart, the minimum would be 170 months, and I can't just ignore those things.

MR. WELSH: I think it would be 151, Judge.

THE COURT: Or 151.

MR. WELSH: 151 months. But, I think you can consider his role in the conspiracy that is charged here.

He's probably the least activity of all of them. He took no trips to Ecuador. He had no contact with the drugs. There is no indication that he received any of the money. The organizers were clearly Isidro and Jesus, and I think your Honor sentenced Isidro to 97 months.

THE COURT: I did, but I really, I think that some of the sentences proposed by the guidelines are much too high, but I do believe the principle that a repeat offender has to be treated with that in mind. That is one of the problems for me.

MR. WELSH: But, I guess if you take that, as opposed to the fact he's been cooperating for 18 months --

THE COURT: I think they might trade each other off.

MR. WELSH: Yes, yes. I would point out the original theory in this case was that he somehow had recruited Del Rosario and Espinal, but as you read through the offense conduct, that doesn't seem to be borne out. These people all knew one another from the Dominican Republic. He didn't have to come in and introduce anybody. He was not really a middle man. The government actually is recommending 120 months, as I understand it, but that would be the longest sentence of any of them that have been before you.

THE COURT: Yes, it would.

MR. WELSH: Isidro got 97 months, and he was the

organizer, so if you gave 120 months, that would be two years longer.

THE COURT: The reason for the difference would be the career offender.

MR. WELSH: Again, if you take into consideration the cooperation that he's done, I think you can take that into consideration. I grant you that he qualifies as a career criminal, but I argue to you that the 5(k) offsets that. I would ask that you consider the family history that Aura has just indicated to you.

THE COURT: I certainly do.

MR. WELSH: The hardship that will create. He's almost certainly to be deported, and even when he finishes his Federal sentence, he still has to make his peace with the Massachusetts court, the New York court and the Connecticut court, so —

THE COURT: That will keep you busy for the rest of your career.

MR WELSH: Well, I'm not sure of that or how long my career has still got to go, Judge. He has been detained since February 5th, according to the pre-sentence report. I would ask he be given credit for time served from that day.

THE COURT: Of course.

MR. WELSH: I have discussed with the probation department he would be like to be considered for the 500 hour

drug program.
THE COURT: I'm ready to recommend that.
MR. WELSH: And, finally, I would ask you for his common law wife's sake and his children's sake, if you would consider at least making a recommendation he serve his Federal sentence at Fort Devins.
THE COURT: I would, but I'm not sure how much that would help.
MR. WELSH: Finally, in answer to your question, I know the government is recommending 120 months. I know we're facing a minimum mandatory of 60 months. I would ask that you consider 60 months and/or some period between the 60 months that I'm recommending and the 120 months that the government is recommending.
THE COURT: Very good. Well, let's hear from Mr. Hernandez. Mr. Hernandez, would you stand, please. Mr. Hernandez, you have the right to tell me anything you wish at this time, and I would like to hear from you. It's more important for me to hear from the defendants than their lawyer, even though you have a very good lawyer, so tell me whatever you want.
THE WITNESS: Well, I want to explain that what I did was —— how can I explain it? It was an accident, because I was trying to do a favor for my cousin, and I didn't know the law. I was trying to do a favor for my cousin. What I did

was my cousin asked me to take that guy to the airport, and because I didn't know the law, I took him, but I ask your forgiveness for that, and I ask you take into account my mother's situation, whether you could give me the minimal participation, because I really -- I didn't get any money out of that. All I did was do that favor. I never received one cent or anything. I also have here that I'm sentenced by an immigration judge, and if you can consider that.

THE COURT: I'm sorry. Would you repeat that?

THE WITNESS: That I've already been sentenced by an immigration judge, and would you consider that, because I don't qualify for probation or anything, because I'm going to be deported. This is the sentence of the judge.

THE COURT: All right. Very good.

Mr. Hernandez, I've given a great deal of thought to your case, so have Mr. Welsh and Ms. Poswistilo, and I know you. I've been thinking about it a long time, and I was glad to hear what your wife had to say, and I wish that I was entirely free to do what you're asking, but I am not entirely free just to say God bless you, you can go home. I'm bound by what are called the sentencing guidelines, which say that I must sentence you within certain parameters.

Now, one of the problems here is that this is not your first offense, and that does make your case different from that of the others in this case. You have been

classified as what is called a career offender, which means that if the government had not recognized your cooperation, you would face a sentence of between 151 months and 180 months. The government does recognize your cooperation and says that it recommends that the sentence be reduced to 120 months. Mr. Welsh asked me to go down to 60 months. I cannot conscientiously do that, but I am prepared to go ahead and sentence as follows: Pursuant to the Sentencing Reform Act of 1994, it is the judgment of the Court that the defendant, Pedro Jose Hernandez, is hereby committed to the custody of the Bureau of Prisons, to be imprisoned for a term of 100 months. Upon release from prison, the defendant shall be placed on supervised release for a term of three years. Within 72 hours of release from custody from the Bureau of Prisons, the defendant shall report in person to the district to which the defendant is released. While on supervised release, the defendant shall not commit another crime. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release and at least two periodic drug tests thereafter. In addition, the defendant shall comply with the standard conditions that are described in the sentencing guidelines and the special conditions of not possessing a

firearm or other dangerous weapon.
The defendant is to participate in a program for substance abuse, as directed by the United States Probation Office, which program may include testing to determine whether the defendant has reverted to the use of alcohol or drugs.
The defendant shall be required to contribute to the cost of services for such treatment, based on his ability to pay or availability of third-party payment.
The defendant is not to consume any alcoholic beverages, and if ordered deported, as apparently you will be, the defendant is to leave the United States and not return without prior permission of the United States Attorney General.
The defendant shall use his true name and will be prohibited from using any aliases, false names, false dates of births, Social Security number, place of birth or any other incorrect identifying information.
It is further ordered that the defendant shall pay the United States a special assessment of $100, which shall be due immediately.
It is recommended that, at the defendant's request, that he be assigned to the 500-hour drug rehabilitation program, if he is eligible, and that he be held in custody, if possible, by the Bureau of Prisons at Fort Devins; or, if not, at a facility as near as possible to this

location so that his family can visit him when they are able to do so.
I want Mr. Hernandez to understand that he has a right to appeal this sentence, and if he wishes to do so, it must be done within ten days, and Mr. Welsh will arrange for the appeal.
I'm sorry I had to read at such great length, but all these things have to be part of the proceedings here.
Mr. Hernandez, I would like to give you a chance for the future. I'm impressed by what your wife had to say.
I know that you want to be a good man and a good father.
I don't believe that I would be doing my duty if I imposed a sentence lower than I did. While a hundred months is eight years, you already have credit for one year. You'll get credit for another year or so during the period of time that you're in custody, and so it will be reduced, actually, to something more like six years, I hope, I believe.
Now, I know the children will be growing in the meantime, and it's a tough world, but I wish you well, and I'm not going to say any more. Thank you all.
THE CLERK: All rise. Court is now in recess.
(Hearing concluded at 3:01 p.m.)

CERTIFICATION

I certify that the foregoing is a correct transcript of the record of proceedings in the above—entitled matter, to the best of my skill and ability.

Janet M. Konarski
JaneM. Konarski
Official Court Reporter

9/30/02
Date

A3

Judgment of the United States District Court for the District of Massachusetts
United States v. Pedro Jose Hernandez
Docket No. 01-10013
Issued by Judge Morris E. Lasker
Entered on August 29, 2002

AO 245B Sheet 1 - Judgment in a Criminal Case - D. Massachusetts (10/01)

United States District Court
District of Massachusetts

UNITED STATES OF AMERICA
v.
PEDRO JOSE HERNANDEZ

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

Case Number: 1 01-cr-10013-003-MEL

Richard M. Welsh
Defendant's Attorney

THE DEFENDANT:
_X_ pleaded guilty to count(s): 1
___ pleaded nolo contendere to counts(s)_____
which was accepted by the court.
___ was found guilty on count(s)_____
after a plea of not guilty.

Accordingly, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count No.(s)
21USC § 963	Conspiracy to import heroin.	08/26/99	1

__see continuation page

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

__The defendant has been found not guilty on counts(s) and is discharged as to such count(s).

__Count(s) _____ is dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States Attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No.: 000-00-2519
Defendant's Date of Birth: *00/00/71*
Defendant's USM No.: 23517-038
Defendant's Residence Address:
Plymouth House of Correction
26 Long Pond Rd.,Plymouth, Ma.02360
Defendants Mailing Address:
Same as above

08/21/02
Date of Imposition of Judgment

s Morris E. Lasker
Signature of Judicial Officer

The Honorable Morris E. Lasker
Name and Title of Judicial Officer

Senior Judge, U.S. District Court
Date 08/22/02

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 100 month(s)

Credit for time served from 02/05/01

__X__ The court makes the following recommendations to the Bureau of Prisons:

1.That the defendant be imprisoned at FMC Fort Devins or another facility near his family to facilitate visitation.

2.That the defendant should participate in the *500* hour drug rehabilitation program if he is eligible.

_X_ The defendant is remanded to the custody of the United States Marshal.

___ The defendant shall surrender to the United States Marshal for this district:

___at_____ on _____

___as notified by the United States Marshal.

___The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

___ before _____ on _____

___ as notified by the United States Marshal.

___ as notified by the Probation or Pretrial Services Officer.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____

to _____

_____ with a certified copy of this judgment.

_____

United States Marshal

By _____

Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from Imprisonment, the defendant shall be on supervised release for a term of 3 year(s) I .The defendant is prohibited from possessing a firearm or other dangerous weapon.

_X_ see continuation page

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13,1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from Imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

____The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check if applicable.)

_X_ The defendant shall not possess a firearm, destructive devlce, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (If Indicated above).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependants and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons:
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment:
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are Illegally sold, used, distributed, or administered:

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer:

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer:

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter Into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court:

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Continuation of Conditions of _x_ Supervised Release
___ Probation

2. The defendant is to participate in a program for substance abuse as directed by the United States Probation Office, which program may include testing to determine whether the defendant has reverted to the use of alcohol or drugs. The defendant shall be required to contribute to the costs of services for such treatment based on the ability to pay or availability of third party payment.

3. The defendant is not to consume any alcoholic beverages.

4, If ordered deported, the defendant is to leave the United States and is not to return without prior permission of the United States Attorney General.

5. The defendant shall use his true name and will be prohibited from using any alliases, false dates of birth, social security numbers, places of birth, or any other pertinent, incorrect identifying information.

AO 245B Judgment in a Criminal Case - 1). Massachusetts
(10/01)Sheet 5, Part A — Criminal MonetaryPenalties
CASE NUMBER: 1: 01-cr~10013-003-MEL Page 5 of 6
DEFENDANT: PEDRO JOSE HERNANDEZ

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
TOTALS	$100.00		

____The determination of restitution is deferred until . An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

_____The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid in full prior to the United States receiving payment.

Name of Payee	*Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
TOTALS	$0.00	$0.00	

___see continuation page

_____ If applicable, restitution amount ordered pursuant to plea agreement. _____

_____The defendant shall pay interest on any fine or restitution of more than *$2,500,* unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet *5,* Part B may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

___.The court determined that the defendant does not have the ability to pay interest, and it is ordered that:
_____ the interest requirement is waived for the ___ fine and/or ___ restitution.
_____ the interest requirement for the fine and/or
_____restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 1 lOA, and 11 3A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

DEFENDANT: PEDRO JOSE HERNANDEZ

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:
A. _X_ Lump sum payment of $100.00 due immediately, balance due

___not later than _____,or
___in accordance with U C, LI D, or El E below; or

B. _____Payment to begin immediately (may be combined with C, D, or E below); or

C. _____Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D. ____ Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E. _____Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise in the special instruction above, if this judgment imposes a period

of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

_____ Joint and Several

Case Number, Defendant Name, and Joint and Several Amount:

___see continuation page

____ The defendant shall pay the cost of prosecution.

____The defendant shall pay the following court cost(s):

____The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (I) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

A4

Judgment of the United States Court of Appeals for the First Circuit
United States v. Pedro Jose Hernandez
Docket No. 02-2127
Entered on January 19, 2005

01-10013
USDC-MABO
J. LASKER

MANDATE
United States Court of Appeals
For the First Circuit

No. 02—2127

UNITED STATES,

Appellee,

v.

PEDRO JOSE HERNANDEZ,

Defendant, Appellant.

Before

Boudin, Chief Judge,
Lipez and Howard, Circuit Judges.

JUDGMENT

Entered: January 19, 2005

In orally announcing a drug testing condition of supervised release, the court directed defendant to "submit to one drug test within 15 days of release and at least two periodic drug tests thereafter." This oral pronouncement controls over the somewhat differently worded written judgment, which expressly (and impermissibly) delegated determination of the number of tests to probation. In conformity with United States v. Lewandowski, 372 F.3d 470 (1st Cir. 2004), we construe the quoted language as limiting the number of tests that probation may order to the mandatory minimum three tests. As construed, there is no improper delegation of authority. As in Lewandoski, the three test limit "does not affect the number of drug tests that may be ordered in consequence of the treatment program that [Hernandez] must attend while on supervised release." Lewandowski, 372 F.3d at 471.

The judgment, as modified and construed in this opinion, is summarily affirmed.

Certified and Issued as Mandate under Fed. R. App. R 41.
Richard Cushing Donovan, Clerk

s/ K. L. Candryo (?)
Deputy Clerk
Date: 2/9/05

By the Court:
Richard Cushing Donovan, Clerk.

By: s/ MARGARET CARTER
Chief Deputy Clerk

[cc: Susan M. Poswistilo, AUSA, Dma Michael Chaitowitz, AUSA, Virginia M. Vander Jagt, AUSA, Michael A. Tucker, Esq.]

A5

Relevant Provisions of 18 U.S.C. § 3553 (a) and (b).

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18 USCS § 3553(a) and (b)

§ 3553 (a). Imposition of a sentence

Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g) 18 USCS § 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or

supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g) 18 USCS § 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities

among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

§ 3553 (b). Application of guidelines in imposing a sentence.

(1) In general.

Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose

an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses.

[(A)] Sentencing. In sentencing a defendant convicted of an offense under section 1201 18 USCS § 1201 involving a minor victim, an offense under section 1591 18 USCS § 1591, or an offense under chapter 71, 109A, 110, or 117 18 USCS §§ 1460 et seq., 2241 et seq., 2251 et seq., or 2421 et seq., the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless--

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in

formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that--

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not

adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

A6

Relevant Provisions of 18 U.S.C. § 3742(e).

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18 USCS § 3742 (e)

Consideration.

Upon review of the record, the court of appeals shall determine whether the sentence--

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c) 18 USCS § 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that--

(i) does not advance the objectives set forth in section 3553(a)(2) 18 USCS § 3553(a)(2); or

(ii) is not authorized under section 3553(b) 18 USCS § 3553(b); or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title 18 USCS § 3553(a) and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c) 18 USCS § 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable. The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under

subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

A7

Rule 11 Hearing of United States District Court for the District of Massachusetts

United States v. Pedro Jose Hernandez

Docket No. 01-10013

Before Judge Morris E. Lasker

Held on November 27, 2001

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

* *

UNITEDSTATES OF AMERICA,
Plaintiff,

vs. Criminal Action
No. 01—CR—10013

JESUS HERNANDEZ, ET AL.,
Defendants.

* *

BEFORE THE HONORABLE MORRIS E. LASKER
SENIOR JUDGE, U.S. DISTRICT COURT
RULE 11 HEARING
November 27, 2001

Courtroom No. 8
U.S. District Court
1 Courthouse Way
Boston, Massachusetts 02210

Deborah L. Crossman, RPR
Official Court Reporter
3507 United States Courthouse
Boston, Massachusetts 02210

APPEARANCES:

UNITED STATES ATTORNEY'S OFFICE (by Susan M. Poswistilo, Esq.) One courthouse Way, Boston, Massachusetts 02210, on behalf of the Government

RICHARD M. WELSH, ESQ., 80 Worcester Street, North Grafton, Massachusetts 01536, on behalf of the Defendant Pedro Jose Hernandez

PROCEEDINGS

THE CLERK: This is Criminal 01—10013, United States of America versus Pedro Jose Hernandez. Would the attorneys please identify themselves and who they represent for the Court.

MS. POSWISTILO: Good morning, Your Honor, Susan Poswistilo for the United States.

THE COURT: Thank you.

MR. WELSH: Good morning, Your Honor, Richard Welsh for the defendant.

MARGARITA CARDENAS, INTERPRETER, SWORN

THE CLERK: Please be seated. Give your full name, spelling your last.

THE INTERPRETER: Margarita Cardenas, C-A-R-D-E-N--A-S.

THE COURT: Thank you very much, ma'am. Good morning. We are here, as I understand it, because Mr. Hernandez has decided he wishes to plead guilty and has entered into a plea agreement with the government. Is that correct, Mr. Welsh?

MR. WELSH: That is correct, Your Honor.

THE COURT: Right. And may I ask you a few questions? How long have you represented Mr. Hernandez in this case?

MR. WELSH: Actually, I was originally

appointed -- I don't have the date with me --
THE COURT: Is it close to a year or something like that?
MR. WELSH: Oh, at least, yes.
THE COURT: I see. And how much time would you estimate you spent reviewing the case with him?
MR. WELSH: I've met with him both when he was in state confinement and down in Plymouth. I would say six or eight times at least.
THE COURT: Are you satisfied that he understands the nature of the charge to which he proposes to plead guilty?
MR. WELSH: I am satisfied.
THE COURT: And are you satisfied that if you went to trial on that charge the government would probably prevail?
MR. WELSH: I'm satisfied that the government would be able to produce sufficient evidence which I believe by the jury would sustain a verdict of guilty.
THE COURT: All right. Are you satisfied that he understands the maximum penalty that could be imposed in the case of an acceptance of a plea?
MR. WELSH: I've gone over that with him in detail, Your Honor.

THE COURT: All right. Now, I want to ask one other question I don't normally ask. I think we had a previous proceeding in which it was believed Mr. Hernandez would plead guilty and then he changed his mind. Are you satisfied that he now has resolved the doubts in his mind and wishes to proceed as indicated?
MR. WELSH: I've gone over it with him in detail. I've provided him with a letter in which I've explained all of his options. And after much consideration he came to the conclusion that he wished to plead guilty.
THE COURT: Very good. Thank you, sir.
THE COURT: Mr. Hernandez, would you stand. Mr. Hernandez, good morning.
THE DEFENDANT: Good morning.
THE COURT: How are you feeling today?
THE DEFENDANT: Okay.
THE COURT: Okay. You've been here once before before me; right?
THE DEFENDANT: Yes.
THE COURT: You have now, as I understand it, changed your mind and feel that you wish to plead guilty to count one of the indictment; is that right?
THE DEFENDANT: (Through the interpreter) Yes.

THE COURT: Okay. Mr. Hernandez, how old are you?
THE DEFENDANT: 30.
THE DEFENDANT: (Through the interpreter) 30.
THE COURT: And how much school have you had?
THE DEFENDANT: (Through the interpreter) Six.
THE COURT: Sixth grade? Where did you go to school?
THE DEFENDANT: (Through the interpreter) In Santa Domingo.
THE COURT: Can you read and write?
THE DEFENDANT: (Through the interpreter) Not perfectly. I can read and write but not too well.
THE COURT: I see. Okay. Are you in good health?
THE DEFENDANT: (Through the interpreter) Yes. Right now I am.
THE COURT: That's good. Have you ever been addicted to drugs or alcohol?
THE DEFENDANT: (Through the interpreter) Yes.
THE COURT: Is that in the past now? How

long have you been in custody?
THE DEFENDANT: (Through the interpreter) Well, now I've been here about 10 months
THE COURT: I see. Okay. Are you under the influence of any drug or sedative right at this moment?
THE DEFENDANT: (Through the interepreter) No.
THE COURT: Are you thinking clearly?
THE DEFENDANT: (Through the interpreter) Yes.
THE COURT: Okay. Now, Mr. Welsh tells me and Ms. Poswistilo that you wish to plead guilty to count one of the indictment. I believe that is a conspiracy count; is that right?
MS. POSWISTILO: Yes, Your Honor.
THE COURT: And that charges you with agreeing with other people to import illegal drugs into this country. Is that the charge you wish to plead guilty to?
THE DEFENDANT: (Through the interpreter) Yes.
THE COURT: Would you tell me in your own words just what you did that makes you guilty of that charge?

THE DEFENDANT: (Through the interpreter) Exactly, I wanted to tell you. I made a mistake. My cousin called me and asked me for a favor. He asked me to take some people -- I knew where he lived in Connecticut, and he wanted me to help him take them to the airport. But I never worked with my cousin. I never charged a cent. I never received a cent for that kind of business.

THE COURT: So what did you agree to do with your cousin?

THE DEFENDANT: (Through the interpreter) He called me and asked me to do him the favor of taking the people to his house and to the airport because he couldn't do it and they didn't know the way. And I knew the people, and I knew where the airport was.

THE COURT: Did you know that there were drugs involved in this?

THE DEFENDANT: (Through the interpreter) I knew that my cousin was involved in that because he had talked about it.

THE COURT: All right. I think it's difficult for Mr. Welsh to give me the details here, but what I'd like to do is ask the government attorney if she would briefly describe the evidence that she believes the government could produce at trial with

regard to count one and Mr. Hernandez. And then, Mr. Hernandez, I'm asking you to listen to what she says and I want to know if you agree with what she says. All right?

MS. POSWISTILO: Certainly, Your Honor.

THE COURT: Thank you.

MS. POSWISTILO: Your Honor, if the case were to go to trial, the government would show that on August 26th of 1999, two individuals were arrested in Houston coming from Ecuador and that these individuals had swallowed approximately 110 pellets containing heroin and that the total amount of heroin that these individuals carried was approximately 995 grams of heroin.

The evidence would show that these two individuals both had ties and lived in Massachusetts -- in Massachusetts -- up in the Lynn, Massachusetts area, that one of the individuals was brought into the group by one of the co-defendants in this case, Juan Espinal. At the time Pedro Jose Hernandez and Mr. Espinal were together, the evidence would show that Mr. Espinal, Mr. Hernandez and the individual by the name of Victor Balbuena, one of the persons arrested, met and talked about Mr. Balbuena taking a trip to Ecuador for the purposes of importing drugs.

The evidence would show that Mr. Hernandez -- Pedro Jose Hernandez actually did participate in the conversation. He talked to Mr. Balbuena regarding how much payment Mr. Balbuena would receive if he agreed to take that trip and that Mr. Hernandez expected some amount of payment from Balbuena if, in fact, he agreed to take the trip

The evidence would show on August 12th of 1999, was which the day Mr. Balbuena and the other swallower -- Mr. Balbuena and the other swallower, Betty Ann Rodriguez left -- backing up a bit, the evidence would show that on that day of the trip that Mr. Hernandez met with Mr. Balbuena and other individuals, including Betty Ann Rodriguez, for the purpose of driving the individuals from Massachusetts to Connecticut and eventually to the airport so that they could depart for this trip to Ecuador, that Mr. Hernandez did, in fact, accompany them, brought them to an apartment in Connecticut where they met up with another co-defendant, Jesus Hernandez. Jesus Hernandez divided the two travelers, Mr. Balbuena and Ms. Rodriguez, money to give to his brother in Ecuador and whatnot and that they all then eventually went to the airport to bring them --

THE COURT: I think that's sufficient for

our purposes.
Mr. Hernandez, did you hear what Ms.
Poswistilo said?
THE DEFENDANT: (Through the interpreter)
heard some of it.
THE COURT: As I understand it, she said
the government could establish that you agreed to drive
these people and you knew that there were drugs involved
and that you expected to be paid something, although you
tell me you haven't been paid anything.
THE DEFENDANT: (Through the interpreter) I
did take them, as I said. But I never received any
money, and I never expected to receive any money. But I
did take them.
THE COURT: But you did know there were
drugs involved?
THE DEFENDANT: (Through the interpreter) I
did know because my cousin had talked to me about that.
But what I was doing was simply a favor that he asked me
-- that they asked me.
THE COURT: All right. Thank you.
Now, I want to be sure, Mr. Hernandez, that
you understand what the possible penalties can be in
case like this. As you probably know from speaking to
Mr. Welsh and maybe to other prisoners, there are two

systems for penalties: One is the law passed by Congress, and the other is what is called the guidelines
Under the law passed by Congress, there's a possible penalty of 20 years in prison and a fine of $1 million and three years' of supervised release and a special assessment of $100. I'm not saying--go ahead.
THE DEFENDANT: (Through the interpreter) Please tell them I am a Dominican and so I wouldn't qualify for that release. I'm in the hands of Immigration. I've already been sentenced by an Immigration Judge
THE COURT: I understand that you are a Dominican, and I was about to add as a result of that fact whatever time is imposed, you may very well face deportation. And I'm sure you're aware of that.
Now, I also want you to understand that although I have authority to sentence you at a rate lower than the maximum here, you do face the possibility of what's called a mandatory minimum. That is, depending on how much was involved in this case, you may face a sentence of a minimum of 10 years or a minimum of five years. And I cannot say at the moment what that will be. Do you understand that?
THE DEFENDANT: (Through the interpreter)

Yes. I just want you to know that if Chao (ph) said he was going to pay me money, he's lying because he never offered to pay me money. And I was never present in the business deal

THE COURT: Well, I'm glad to know that, and I'll take that into consideration if I find that to be the fact.

Now, Mr. Hernandez, let me ask you a few more questions. I want to be sure that you understand what your rights are under American law before I accept your plea of guilty. You do not have plead guilty to this charge. Do you understand that?

THE DEFENDANT: (Through the interpreter) Yes.

THE COURT:You have the right to go to trial. If you went to trial, you would be represented by your attorney, Mr. Welsh. He would have the right to question the witnesses against you; and you could testify, if you wished to, or you could not testify if you didn't want to. And if you wanted, I'd tell the jury you didn't have to testify.

If I accept your plea of guilty, you understand therewill be no trial. Now, if you were tried by a jury, in order to be convicted, the government would have to prove its case beyond a

reasonable doubt. And all of the jurors would have to agree that you're guilty. Do you understand that?
THE DEFENDANT: (Through the interpreter) Yes.
THE COURT: If I accept your plea of guilty, I can impose the same penalty as could be imposed as if you were found guilty by the jury. Do you understand that?
THE DEFENDANT: (Through the interpreter) Yes.
THE COURT: All right. Just a few more q questions. Mr. Hernandez, has anybody told you -- has anybody pressured you to make you plead guilty to this charge?
THE DEFENDANT: (Through the interpreter) No.
THE COURT: Are you doing so of your own free will?
THE DEFENDANT: (Through the interpreter) Yes.
THE COURT: And tell me why you've decided to plead guilty now because I know you were not sure about that before.
THE DEFENDANT: (Through the interpreter) I had not gone over my papers carefully enough, and I

wasn't well enough aware of my accusations.
THE COURT: Thank you for that answer.
MR. WELSH: I should point out to Your Honor that Your Honor permitted all the transcripts for the grand jury testimony translated to Spanish and given to him. And I think that assisted him to reach his conclusion.
THE COURT: Very good. You can be seated now.
I'm satisfied that Mr. Hernandez is in good health and has clear thinking, that even though he has not had much education, he understands the nature of the charge against him here and the nature of the agreement he has signed with the government. I am satisfied that there's a factual basis for his plea of guilty and that he has intelligently and voluntarily waived his right to a jury trial. And I'll accept the plea, and we'll set a date for sentencing.
THE CLERK: Sentencing will be February 14, 2002 at 2:15.
THE COURT: Very good. And since Mr. Hernandez is in custody --you understand, Mr. Hernandez, that you will be given credit for time served already. Do you have a question? I see you raising your hand.

THE DEFENDANT: (Through the interpreter) I am willing to cooperate with you, and I am unable to take you to the people who are the real responsible ones for this.

THE COURT: Well, that's to be arranged between your attorney and the attorney for the United States government. And that certainly will be taken into consideration at the time of sentencing.

MR. WELSH: I would just add, if I may, when he was originally indicted, he was being held pending a state matter. And then eventually I understand that the state matter was disposed of, and that's when he was transported down to Plymouth. So I'm not exactly sure how much time he's going to get credit for. We'll have to get that sorted out between us.

MS. POSWISTILO: That's correct, Your Honor.

THE COURT: Well, I don't know about how much time he will be legally credited for. That is something I will personally take into consideration in sentencing.

MR. WELSH: Very good. Thank you.

THE CLERK: All rise. Court is now in recess.

(Whereupon the proceedings adjourned.)

CERTIFICATE

I, Deborah L. Crossman, Official Court Reporter for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes ability.

S/ Deborah L. Crossman, RPR
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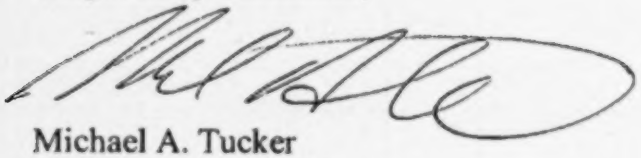
Respectfully Submitted,



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